1957

Minnie Pearl Dalton v. Max Dalton et al : Brief of Respondents

Utah Supreme Court

Adams, Peterson & Anderson; Attorneys for Respondents;

Case No. 8568

IN THE SUPREME COURT
of the
STATE OF UTAH

MINNIE PEARL DALTON, as Administratrix of the Estate of James F. Dalton, deceased, and MINNIE PEARL DALTON,

Plaintiff and Appellant,

—vs—

MAX DALTON, et al.,

Defendants and Respondents.

RESPONDENTS BRIEF

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STATEMENT OF THE CASE

Plaintiff and appellant in her brief refers to the parties as in the lower court and for uniformity we will do so also. The statement of the case as set forth in appellant's brief is substantially correct. We do, however, call attention to the fact that by leave of court both the complaint and answer were amended just prior to the trial of the issues (Tr. 3). These amendments made Minnie Pearl Dalton, individually, a party plaintiff and allowed the defendants to set up Section 78-12-5 and 6, Utah Code Annotated, 1953; and Estoppel as defenses to the action.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE DECEASED, JAMES F. DALTON AND HIS WIFE, MINNIE PEARL DALTON, EXECUTED THE WARRANTY DEED DATED OCTOBER 27, 1930 (DEF. EX. 1) TO DANIEL PERKINS.

POINT II.

THE COURT DID NOT ERR IN FINDING THAT THE ESCROW AGREEMENT (DEF'S. EX. 2) HAD BEEN COMPLIED WITH AND THAT THE WARRANTY DEED DATED OCTOBER 27, 1930 EXECUTED BY JAMES F. DALTON AND MINNIE PEARL DALTON, GRANTORS, AND LEFT IN ESCROW WITH THE SAN JUAN STATE BANK HAD BEEN VALIDLY DELIVERED.

POINT III.

THAT THE COURT DID NOT ERR IN FINDING THAT THE DEFENDANT, MAX DALTON, HAD ACQUIRED TITLE TO THE PROPERTY BY VIRTUE OF ADVERSE POSSESSION.

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE DECEASED, JAMES F. DALTON AND HIS WIFE, MINNIE PEARL DALTON, EXECUTED THE WARRANTY DEED DATED OCTOBER 27, 1930 (DEF. EX. 1) TO DANIEL PERKINS.

The evidence is sufficient to support the court's finding that both James F. Dalton and his wife, Minnie Pearl Dalton signed and executed the warranty deed dated October 27, 1930, (DEF. Ex. 1).

Mr. Halls, a witness for the defendants, testified that he had lived in Monticello since 1915 (Tr. 28) and that he became acquainted with James F. Dalton soon after he, (Mr. Halls) moved to Monticello and that he was acquainted with Minnie Pearl Dalton and that he was a notary public on the 28th day of October, 1930 (Tr. 29), and that it was his signature on defendant's Exhibit 1 (Tr. 30). He further testified that the deed was signed in his presence as a notary public (Tr. 30) and that aside from the formality of notarization he was personally acquainted with James F. Dalton's signature and that it was his signature (Tr. 31). As to Minnie Pearl Dalton's signature he stated that he knew it was her signature because he had acknowledged it.

Appellant makes much of the point that Mr. Halls did not remember the circumstances of the signing. We submit that he was telling the truth. He testified as to his practice as a notary public as follows:

> "Q. The Court, don't talk what every other notary does. You tell what your practice was."
>
> "A. Require them to be there and sign. If I ever took an acknowledgment in absence I don't remember that time." (Tr. 36).

We further submit that if Mr. Halls had testified that he remembered the circumstances, after a period of 26 years had elapsed, his veracity and credibility might well have been questioned. It is doubtful that any notary would remember such circumstances after such a lapse of time.

While it is true that the instrument (Def. Ex. 1) recited that the Daltons were residents of Cortez, Montezuma County, Colorado, the acknowledgment is in due form for San Juan County, State of Utah. There was testimony that the Dalton family had lived in Mancos, Colorado, (Tr. 25, 83) in the spring and fall of 1931. Mancos is in Montezuma County, Colorado.

Appellant refers to defendants' Exhibit 2 which is a copy of a letter addressed to the State Bank of San Juan, Monticello, Utah, dated October 27, 1930 and urges that from the fact that the acknowledgment is dated October 28, 1930, that the signatures were on the deed before it was presented to Mr. Halls for acknowledgment. This is rank speculation and has no foundation in fact. It should be noted here that the deed was typed in its entirety except for signatures and that there is nothing in the record to show when it was actually delivered in escrow to the bank. There is also nothing in the record to indicate when, where and by whom said deed was prepared.

We do not agree that any point can be made of the fact that the Appellant, Mrs. Dalton, did not sign the escrow agreement with the bank. In view of the fact that the deed bearing both signatures was in fact delivered to the bank, it was not necessary for Mrs. Dalton to sign the agreement in order to create a valid escrow.

As to the weight to be given to the testimony of appellant, Minnie Pearl Dalton, on these matters, we call attention to the transcript of her testimony on cross

examination beginning on Page 12 when her affidavit of prejudice (DEF'S Ex. 3.) was presented to her. While the exhibit is not dated, it was apparently signed by her on or about the last of November, 1955, and a copy sent to counsel for defendant on December 5, 1955. She testified as follows:

> "Q. You recognize your signature Mrs. Dalton, is it or is it not your signature?"
>
> "A. I don't think so, I don't think I have seen it before . . ." (Tr. 12).

Even her own counsel became non-plussed by her obvious attempt to cover up the facts and his effort to correct her testimony on redirect examination as contained in the transcript on Pages 14 and 15, and finally her admission that she signed a paper in Mr. Flanders' Office, is most revealing. On recross examination, she finally admitted that the signature on the affidavit of prejudice was hers (Tr. 27).

Appellant's brief is completely silent on the testimony of Sam F. Parry, a witness for the defendants. Mr. Parry had been a banker since 1943 during which time he had become well acquainted with signature comparison. He was a completely disinterested witness and not acquainted with any of the parties to the action. (Tr. 61 and 62). Defendants' Exhibit 1, the deed, and defendants' Exhibit 3, the known signature on the affidavit of Prejudice, were presented to him and his testimony was as follows:

"Q. Do you have an opinion as to whether those two signatures were written by the same person," The Court, "Answer yes or no, as to whether you have an opinion."

"A. Yes, my opinion is that . . .

"A. My opinion is that the signatures were written by the same person."

"Q. The Court: Now, there are two signatures on the one document, which name do you refer to, Maggie Pearl Dalton?"

"A. "The Minnie Pearl Dalton."

"Q. Will you state what you base your opinion upon, Mr. Parry?"

"A. The form of the handwriting is very similar. There is no evidence of tracing on either document. The dots above the i's are more in the form of a small line, rather than a dot. This irregularity appears on both documents. The form of the handwriting doesn't indicate hesitancy in the signature, particularly indicates that the person is in the habit of signing in this manner. The break in the final word "Dalton" shows that the pen was lifted between the "t" and the "o" in both instances. There is a slight left swing at the end of the word which more or less would be an involuntary action in the signature and it appears in both." (Tr. 64 and 65).

We submit that in view of the testimony of Mr. Halls both personally and as a notary public; and the analysis of the signature of Mrs. Dalton by Mr. Parry; and in view of the reluctance of Mrs. Dalton to be forthright about her action with respect to her known signa-

ture; and a close analysis of the signatures on all the documents; leads to the inescapable conclusion that both Mr. and Mrs. Dalton, in fact, signed the deed as the lower court held.

POINT II.

THE COURT DID NOT ERR IN FINDING THAT THE ESCROW AGREEMENT (DEF'S. EX. 2) HAD BEEN COMPLIED WITH AND THAT THE WARRANTY DEED DATED OCTOBER 27, 1930 EXECUTED BY JAMES F. DALTON AND MINNIE PEARL DALTON, GRANTORS, AND LEFT IN ESCROW WITH THE SAN JUAN STATE BANK HAD BEEN VALIDLY DELIVERED.

It is the contention of the respondents that there was ample evidence of an escrow contract and agreement between James F. Dalton and the bank and Perkins Brothers, by the terms of which it would have been paid out in full at the end of seven years or in approximately the year 1934. (DEF'S Ex. 2).

In his instructions to the Bank as escrow holder, Mr. Dalton acknowledged receipt of part of the consideration of the agreement dated June 1, 1927, which was a part of the entire document. It is to be noted that Perkins Brothers were to pay all taxes as they became due. Plaintiffs' Exhibit D shows that all taxes from the year 1930 to 1941 were paid by the Perkins or their agents and that the defendant, Max Dalton, paid the taxes from 1942 to 1955, inclusive.

Unfortunately, those who knew all the facts regarding the entire transaction are no longer available.

Of necessity, we are now forced to draw certain conclusions from the known facts. It must be presumed that the bank, as escrow holder, carried out the instructions contained in the letter of escrow and that upon completion of the terms therein contained, the papers, including the deed, were turned over to H. C. Perkins by the bank, from the fact that they were ultimately found in the probate file of the H. C. Perkins estate. Otherwise, they would have been turned back to James F. Dalton or his family.

In 30 C.J.S. Para. 18 Page 1222 under Escrows, we find under the heading of Evidence that:

> "Where an instrument deposited as an escrow is found in the possession of the party for whom it was intended, it is presumed to have been delivered properly." (Citing Clements v. Hood 57 Ala. 459; and Firemen's Ins. Co. v. McMillan. 29 Ala. 147).

We submit that Donald Adams, as attorney for the Administrator, was not a third party or a stranger to the transaction in the sense that the term is used in the cases cited by appellant. We call attention to defendants' Exhibit 5 which is the abstract of title on the real estate involved in this case. The entry beginning on Page 13 is a decree of settlement in the probate of the estate of Hyrum C. Perkins, deceased, dated April 21, 1942, wherein the real estate involved in this case was distributed to his heirs. Plaintiff's Exhibit D is a statement of the tax record for the years 1930 to 1955, inclusive, and shows that the taxes against said real estate

were assessed in the name of the H. C. Perkins estate from 1943 to 1948 and assessed in the name of the defendant, Max Dalton from 1949 to 1955, inclusive. Max Dalton recorded his deed on November 5, 1948, (DEF'S Ex. 5, abstract Entry No. 15).

The evidence shows that the record title for the entire period of thirteen years from 1942 to 1955, inclusive, was in the heirs of H. C. Perkins and Max Dalton, and that the taxes were paid for the entire period by Max Dalton. In addition to paying all the taxes he was in the exclusive, open and notorious possession of said premises and used said premises in the usual manner, namely, that of grazing, all during said period. While it is true that the deed from Minnie Pearl Dalton and James F. Dalton dated October 27, 1930 to Daniel Perkins was not recorded until November 5, 1948, it is reasonable to assume that the deed was in possession and control of the heirs of the grantee and had been for some years prior thereto, otherwise, the real estate would not have been included in the assets of the estate of Hyrum Perkins. In view of these facts, the actual delivery of the deed by Mr. Adams as attorney for the Administrators of the estate to Max Dalton and the recording of it was routine and its importance to the case of appellants becomes insignificant.

Vol. 26A of CJS Para. 183, Page 14 on Delivery of Deeds states:

> "The delivery of a deed may be presumed after the lapse of many years, especially where the parties are dead and the grantee's possession

of the property has been undisputed." . . . "When the circumstances are such to give rise to a presumption of delivery, the presumption is rebuttable, and the burden of overcoming such presumption rests on the person who denies delivery."

Vol. 26A of CJS Para. 204, Sec. C, Page 78:

"While the fact that a deed duly executed appears of record is not ordinarily conclusive proof of its delivery, the fact that such recordation is some evidence of its delivery, which, in the absence of rebutting evidence, or in connection with other circumstances showing an intention to deliver, may be sufficient to establish a delivery . . . *Delay in recording does not negative delivery.*" (Italics ours)

(G) "The presumption arising from possession of the deed by the grantee . . . may be overcome only by the most satisfactory evidence, by counter evidence of superior weight or by clear and convincing evidence."

Appellants have not carried this burden of proof.

Notwithstanding the fact that the probate file was a public record and the further fact that the taxes were paid by Perkins and Dalton and that Perkins and Dalton were in possession of said property, all of which must be deemed to have given appellants notice of their adverse claim, James F. Dalton and after his death, his heirs, did nothing whatsoever about said property until many years later. They left it from 1926 until 1955 at which time they returned to take possession of it. (Tr. 7 and 8). The only explanation of record as to their reason for non-activity in asserting title against re-

spondents, and their predecessors in interest, is the statement that from 1927 to 1942 the Perkins Brothers were their agents and were to pay the taxes on the place. (Tr. 24). Letters of Administration in the estate of James F. Dalton were not obtained until June 9, 1955, over ten years after his death. If appellant and her children seriously believed they had ownership rights in the property they would not have delayed so long in asserting them. The record of this case is entirely silent as to their explanation of inactivity or non-possession for the years 1942 to 1955, inclusive, and which period of time becomes extremely important as to the applicability of Sections 78-12-5; 78-12-6; 78-12-7; 78-12-8; 78-12-9; 78-12-12, Utah Code Annotated, 1953.

POINT III.

THAT THE COURT DID NOT ERR IN FINDING THAT THE DEFENDANT, MAX DALTON, HAD ACQUIRED TITLE TO THE PROPERTY BY VIRTUE OF ADVERSE POSSESSION.

The lower court found as follows:

> "11. Neither of the plaintiffs nor any agent, tenant or employee of the plaintiffs has been in actual possession of the property involved herein at any time since October 28, 1930." (Finding of Fact No. 11.)

The court reached the following conclusion:

> "That the plaintiffs, Minnie Pearl Dalton, Administratrix of the Estate of James F. Dalton, deceased, and Minnie Pearl Dalton in her own

> right as surviving wife of James F. Dalton and otherwise are each barred from claiming said real estate or any right therein by reason of the facts set forth and by reason of the provisions of Sections 78-12-5; 78-12-6; 78-12-7; 78-12-8; 78-12-9; 78-12-12, Utah Code Annotated, 1953." (Conclusion of Law No. 2.)

Both this Finding of Fact and Conclusion of Law are supported by the evidence in this case. The record is devoid of any evidence which would entitle the appellant to prevail in this action. Certainly, the burden of proof was upon her to establish her case and to bring it within the exception of Section 78-12-5, Utah Code Annotated, 1953, which provides as follows:

SEIZURE OR POSSESSION WITHIN SEVEN YEARS NECESSARY

> "No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestors, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action."

This she failed to do.

Vol. 26A of CJS, Para. 202, Page 69, correctly states our position in this case:

> "Title to real property resting on warranty deeds of record, followed by open and notorious occupation and assertion of title, should not be easily and readily disturbed, especially where the attempt to overthrow such title is made after the death of the party most vitally interested therein."

CONCLUSION

We respectfully submit that the Findings of Fact and Conclusions of Law and the Decree as entered in this case are all amply supported by the evidence and that the lower court should be sustained.

Respectfully submitted,

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